

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

Petition of Mid-Rivers Telephone Cooperative, Inc. )	
For Order Declaring it to be an Incumbent )	WC Docket No. 02-78
Local Exchange Carrier in Terry, Montana )	
Pursuant to Section 251(h)(2) )	

**COMMENTS OF SBC COMMUNICATIONS INC.<sup>1</sup>**

**I. INTRODUCTION AND SUMMARY.**

The 1996 Act establishes a “pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”<sup>2</sup> The stated purpose of this legislation was “to increase competition in all telecommunications markets and *provide for an orderly transition from regulated markets to competitive and deregulated telecommunications markets.*”<sup>3</sup> Classifying a local exchange carrier (“LEC”), such as Mid-Rivers, as an incumbent local exchange carrier (“ILEC”) merely because it has been a successful competitor to an incumbent LEC would be antithetical to this purpose. Rather than eliminating regulation in response to increased competition as Congress intended, classifying Mid-Rivers (a competitive LEC (“CLEC”) that has succeeded in taking away virtually all of the incumbent’s customer base using self-deployed, redundant facilities), or any

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<sup>1</sup> SBC Communications Inc. files these comments on behalf of itself and its wholly-owned subsidiaries, including: Southwestern Bell Telephone LP, Pacific Bell, Nevada Bell, Ameritech Illinois, Ameritech Indiana, Ameritech Michigan, Ameritech Ohio, Ameritech Wisconsin, the Southern New England Telephone Company, ASI, AADS Illinois, AADS Michigan, AADS Indiana, AADS Ohio, AADS Wisconsin, SBC LD, and SBC Telecom (collectively “SBC”).

<sup>2</sup> The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Preamble (1996 Act) (Conference Report).

<sup>3</sup> Telecommunications and Deregulation Act of 1995, S. Rep. No. 23, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 16 (1995) (Senate Report) (emphasis added).

similarly situated CLEC, as an ILEC would perpetuate obsolete regulation solely to allow Mid-Rivers to manipulate the federal universal service support mechanisms to obtain increased support.<sup>4</sup>

The 1996 Act, and section 251 in particular, distinguishes between three types of carriers, assigning different rights and responsibilities to each. The Act imposes certain, minimum interconnection and network engineering requirements on all telecommunications carriers under section 251(a).<sup>5</sup> The Act imposes additional obligations on LECs, including the obligation to resell telecommunications services, establish reciprocal compensation arrangements, and provide number portability, dialing parity and access to rights of way.<sup>6</sup> And it imposes significantly more stringent and onerous obligations on ILECs, including, *inter alia*, the duties to provide access to unbundled network elements, resell services at a discount, and to provide collocation and interconnection consistent with the requirements of section 251(c)(2).

As the Commission has acknowledged, the Act makes these distinctions and imposes more onerous obligations on ILECs because, prior to the Act, ILECs “typically occup[ied] a dominant position in the market for telephone exchange service in their respective operating areas,” and could “make efficient competitive entry difficult, if not impossible, absent compliance with the obligations of section 251(c).”<sup>7</sup> The Act thus imposes greater obligations

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<sup>4</sup> In its petition, Mid-River baldly asserts that, if its petition is granted, it will promptly file a petition to waive the frozen study area rules to incorporate the Terry exchange into its ILEC study area. Mid-Rivers Petition at 3. Thus, it is clear that one of Mid-Rivers’s primary reasons for seeking ILEC status in Terry, Montana is so that it can obtain increased universal service support as a rural carrier. As discussed below, the Commission should not tolerate such a cynical attempt to manipulate the universal service regime. Plainly, where a carrier has been able to extend its facilities into an area and profitably serve the vast majority of customers in that area without federal universal service support, there can be no justification for allowing that carrier to manipulate the rules to increase its profits.

<sup>5</sup> 47 U.S.C. § 251(a).

<sup>6</sup> 47 U.S.C. § 251(b).

<sup>7</sup> *Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Sections 3(37) and 251(h)(2) of the Communications Act*, Declaratory Ruling and Notice of Proposed Rulemaking, 12 FCC Rcd 6925, 6941, para. 26 (1997) (*Guam Declaratory Ruling*).

on ILECs than other LECs in order to offset the ILEC's purported advantages of incumbency and to facilitate competitive entry.

Where, as in the case of Mid-Rivers in Terry, an efficient competitor has successfully entered the market, deployed an overlay network that replicates (and, in some respects, may even be superior to) the incumbent's network, and succeeded in winning virtually all of the customers in that market away from the incumbent, which nevertheless remains in the market as a competitor, there is no justification for perpetuating dominant carrier regulation of any carrier in the market. In this context, neither carrier possesses market power, nor can either block competitive entry. As a consequence, the Commission should neither classify the CLEC as an incumbent LEC, nor should it continue to impose dominant carrier regulation on the ILEC. And, irrespective of whether the CLEC is classified as an ILEC, the Commission should not permit the CLEC to manipulate the federal universal service support regime to obtain increased universal service funding. Rather, it should limit any universal service support payments to the CLEC (in this case, Mid-Rivers), to the lesser of whatever support it is receiving today or the per-line support available to the ILEC in the same area (in this case, Qwest).

## **II. THE COMMISSION SHOULD NOT CLASSIFY A COMPETING FACILITIES-BASED LEC SUCH AS MID-RIVERS AS AN INCUMBENT LEC.**

Under section 251(h), the Commission may not classify and treat a carrier as an ILEC in an area unless three conditions are satisfied: (1) the carrier occupies a position in the market for telephone exchange service within an area that is "comparable to the position" occupied by an ILEC; (2) the carrier has substantially replaced an ILEC, and (3) such treatment is consistent with the public interest, convenience, and necessity and the purposes of [section 251].<sup>8</sup> Irrespective of how the Commission defines the relevant area for purposes of section 251(h), an

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<sup>8</sup> 47 U.S.C. § 251(h)(2).

issue which SBC does not address herein, Mid-Rivers plainly does not meet the first and third criteria.<sup>9</sup>

Even if the Commission were to assume that the relevant market for analysis is Terry, Montana, Mid-Rivers does not occupy a position in Terry that is comparable to an ILEC. To be sure, Mid-Rivers now provides facilities-based service to 97 percent of the access lines in the Town of Terry and 93 percent of the access lines in the Terry exchange as a whole.<sup>10</sup> But the mere fact that it serves virtually all of the lines in the Terry exchange does not mean that Mid-Rivers “occupies a position that is comparable to the position occupied by [an ILEC],” as required under section 251(h). As discussed above, the 1996 Act classifies some carriers as ILECs, and imposes stringent regulatory requirements on them, because they “typically occupy a dominant position in the market for telephone exchange service in their respective operating areas.”<sup>11</sup> Under the Commission’s rules, a carrier is dominant if it has “market power (*i.e.*, the power to control prices).”<sup>12</sup> Because Qwest has not exited the market in the Terry Exchange, and, as the ILEC in that exchange, continues to have facilities capable of serving all of the access lines in Terry, Mid-Rivers does not have the ability unilaterally to restrict output and raise rates. If it were to attempt to raise rates above competitive levels, customers immediately could switch

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<sup>9</sup> SBC also does not address whether Mid-Rivers has substantially replaced Qwest, but reserves its right to address this issue on reply.

<sup>10</sup> Mid-Rivers Petition at 2.

<sup>11</sup> *Guam Declaratory Ruling* at para. 26.

<sup>12</sup> 47 C.F.R. § 61.3(q). See also *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-1149 & 96-61, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15804 (1997) (*LEC Classification Order*) (holding that dominant carrier regulation is designed specifically to prevent a carrier from exercising market power – that is, unilaterally control prices); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Memorandum Opinion and Order, 11 FCC Rcd 3271, 3312-15 (1996) (declaring AT&T to be non-dominant despite evidence that AT&T, MCI and Sprint had increased basic schedule rates in lock-step, because it found that the evidence did not support a finding AT&T retained power “unilaterally” to raise residential rates above competitive levels”).

back to Qwest. As a consequence, Mid-Rivers lacks market power and does not occupy “a dominant position” in Terry, and, concomitantly, does not occupy a position that is comparable to that of an ILEC. On that ground alone, Mid-Rivers petition should be denied.

Granting Mid-Rivers’s Petition also would not be consistent with the public interest and the purposes of section 251, and thus fails to meet the third criterion for treating comparable carriers as incumbents. First, as noted above, section 251(c) imposes “additional obligations” on ILECs to offset their dominant position in the market and facilitate efficient competitive entry. Insofar as Mid-Rivers lacks market power (and thus a dominant position) in Terry, as previously discussed, the imposition of dominant carrier regulation is inconsistent with the overarching goals of section 251 and the 1996 Act as a whole, which are “to provide for an orderly transition from regulated markets to competitive and deregulated telecommunications markets.”<sup>13</sup>

Second, as Mid-Rivers makes clear in its petition, Mid-Rivers is seeking ILEC status in the Terry Exchange as a stepping stone to incorporating the exchange in its ILEC study area and the NECA tariff.<sup>14</sup> Once it has incorporated Terry into its ILEC study area, Mid-Rivers presumably will claim that it is entitled to obtain universal service support pursuant to the rural support mechanism, and thus much higher support than it currently receives. Moreover, by including the Terry exchange in the NECA tariff, Mid-Rivers will be able to provide services under rate-of-return regulation, rather than as the competitive carrier it is. Given the fact that it was able to successfully enter the market, deploy an overlay network, and win virtually all of Qwest’s customers as a CLEC, there can be no justification for providing increased universal service support or allowing Mid-Rivers to provide service on a rate-of-return basis.

Moreover, if the Commission were to grant Mid-Rivers’s request, other rural carriers that, like Mid-Rivers, have successfully entered the market with self-deployed facilities in neighboring exchanges likely will file similar petitions to obtain ILEC status in those exchanges.

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<sup>13</sup> Senate Report at 16; *see also* Conference Report Preamble.

<sup>14</sup> Mid-Rivers Petition at 3.

Such a decision not only would significantly increase universal service support payments to those carriers (unnecessarily inflating the fund), but also encourage inefficient market entry by rural carriers seeking to expand into adjacent exchanges simply to inflate their universal service support payments rather than to implement a rational business plan.<sup>15</sup> Plainly, any such outcome would be inconsistent with both the goals of the Act and the public interest. Mid-Rivers' petition thus fails to satisfy the third criterion for treating comparable carriers as incumbents, and should be denied.

### **III. THE COMMISSION SHOULD ELIMINATE DOMINANT CARRIER REGULATION IN TERRY.**

The Act and the Commission's rules include myriad provisions designed to protect against anti-competitive behavior by dominant carriers. And, as discussed above, Congress imposed unprecedented obligations in the 1996 Act specifically on ILECs to unbundle certain essential network elements at cost-based rates, to make their retail telecommunications services available to other carriers at a wholesale discount, and to interconnect their networks with the facilities of other carriers. All such requirements serve a common purpose: protection against potential anti-competitive actions by dominant carriers. However, once these requirements have served their purpose, and facilities-based, retail competition has taken hold in a definable geographic market, their continued enforcement will cause serious harm by distorting the market through asymmetrical regulatory burdens, discouraging investment, and depriving consumers of the innovation and efficiency that are the hallmarks of a truly free, competitive marketplace. Under such circumstances, Commission action – by whatever appropriate procedural vehicle, including forbearance – is necessary to ensure that the continued application of these requirements does not deny consumers the very benefits that the Act and the Commission's rules are intended to secure.

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<sup>15</sup> As it has in the context of the sale of exchanges, the Commission should limit any universal service support payments to Mid-Rivers (and other carriers in comparable circumstances) to the lesser of whatever support they currently receive or the per-line support available to the ILEC, and thus discourage carriers from entering a market simply to obtain increased universal service support. *See* 47 C.F.R. § 54.305 .

The definitional question of whether Mid-Rivers is an “incumbent” in Terry thus should not obscure the more fundamental conclusion that must be drawn from the competitive landscape in areas such as Terry: there is no justification for retaining legacy dominant carrier regulation in such communities. The facts demonstrate that barriers to entry into the local telecommunications market in Terry have been eliminated and a competitive provider has actually entered and captured a substantial share, indeed, nearly all, of the market from Qwest. According to its petition, Mid-Rivers now serves 97% of all lines in the town of Terry and 93% of all lines in the entire exchange.<sup>16</sup> Consumers in Terry thus now enjoy head-to-head facilities-based competition between Mid-Rivers and Qwest. Neither carrier possesses market power, nor can either block competitive entry. Under these circumstances, continued enforcement of legacy regulatory requirements against Qwest (or any other carrier) is neither necessary to protect consumers nor to ensure that rates and practices are just and reasonable and not unreasonably discriminatory. Moreover, elimination of such regulation is consistent with the public interest.

The Commission has squarely held that consumers stand to benefit when “competition among providers” is permitted to flourish.<sup>17</sup> The Commission also has held that such “*competition* is the most effective means of ensuring” that a service is available on “just and reasonable” and “not unjustly or unreasonably discriminatory” terms and conditions.<sup>18</sup> The focus of the Commission’s attention thus should not be on classifying another carrier as an “incumbent” in Terry, but rather on eliminating legacy regulations that no longer serve any purpose in the competitive landscape that has developed in Terry.

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<sup>16</sup> *Mid Rivers Petition* at 2.

<sup>17</sup> *Petition of SBC Communications Inc. for Forbearance of Structural Separation Requirements and Request for Immediate Interim Relief in Relation to the Provision of Non-local Directory Assistance Services*, Memorandum Opinion and Order, 18 FCC Rcd 8134, para. 16 (2003).

<sup>18</sup> *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270, para. 31 (1999) (emphasis added).

**IV. THE COMMISSION SHOULD MAKE CLEAR THAT MID-RIVERS CANNOT MANIPULATE THE UNIVERSAL SERVICE SUPPORT REGIME TO OBTAIN INCREASED FUNDING.**

Irrespective of whether the Commission classifies Mid-Rivers as an ILEC, the Commission should not permit Mid-Rivers to manipulate the federal universal service support regime to obtain increased universal service funding.<sup>19</sup> As discussed above, Mid-Rivers has stated that, if its petition is granted, it will promptly file a petition to waive the frozen study area rules and incorporate the Terry exchange into its adjacent ILEC study area.<sup>20</sup> Once it has done so, Mid-Rivers undoubtedly will claim that it is entitled to universal service funding in Terry under the rural support mechanisms, and thus much higher support than it currently receives – indeed, SBC is aware of no other reason why Mid-Rivers would seek to consolidate the Terry exchange into its ILEC study area. But where a carrier like Mid-Rivers has been able to extend its facilities into an area and profitably serve the vast majority of customers with little or no universal service support, there is no basis for allowing that carrier to manipulate the universal service regime to obtain additional funding and thus increase its profits. Indeed, allowing a carrier to obtain increased support in these circumstances would provide that carrier more support than necessary to enable it to provide universal service at an affordable rate, and thus allow it to use that support for purposes other than providing, maintaining or upgrading the facilities and services for which support was intended, contrary to the requirements of section 254(e). Accordingly, the Commission should limit any universal service support payments to Mid-Rivers (or other carriers in comparable circumstances) to the lesser of whatever support it is receiving today or the per-line support available to Qwest.

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<sup>19</sup> See *supra* n.16.

<sup>20</sup> Mid-Rivers Petition at 3.



**V. CONCLUSION.**

For the foregoing reasons, the Commission should deny Mid-Rivers' petition, eliminate dominant carrier regulation in Terry, Montana, and limit any universal service support payments to Mid-Rivers to the lesser of whatever support it is receiving today or the per-line support available to Qwest.

Respectfully Submitted,

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